Supreme Court, U.S.
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CASE NO.

THE UNITED STATES SUPREME COURT

1995/1996 Term

Grant Reynolds and the Estate of
Dale C. Eckert Corporation, in Bankruptcy
Petitioners

v.

Philip Wagner and William Simon
Respondents

Petition for Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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43 pp

I. QUESTION PRESENTED FOR REVIEW

Are district courts permitted by *Federal Rule of Appellate Procedure 4 (a)(5)* to grant additional time for filing a notice of appeal for "good cause" if leave is sought between the thirty-first and sixtieth day following entry of judgment?

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IV. REPORTS AND OPINIONS

On October 28, 1995 the United States District Court , Central District of California, Judge Gary S. Taylor presiding, granted Petitioners' motion for an extension of time to file a notice of appeal. The motion and decision was based on Petitioners' representation that "good cause" existed for the extension of time.

On May 26, 1995 the Ninth Circuit Court of Appeals, Northern District of California, held that a finding of "good cause" under *Federal Rule of Appellate Procedure 4 (a)(5)* was only applicable to applications for an extension of time filed on or before the thirtieth day, that is to say before the original time to file the notice had run.

A petition for reconsideration and a suggestion for rehearing *en banc* denied without comment.

V. BASIS OF JURISDICTION

This writ concerns a decision of the Ninth Circuit Court of Appeals made May 26, 1995. Jurisdiction is believed conferred upon this Court by *United States Supreme Court Rule 10.1 (a)*, in that the decision rendered is in direct conflict with decisions of other United States courts of appeal on the same matter.

Jurisdiction was conferred upon the Ninth Circuit in the underlying matter when appeal was taken as a matter of right pursuant to *Federal Rule of Appellate Procedure 4.*

VI. PETITION FOR WRIT OF CERTIORARI

A. Introduction

Grant Reynolds and the Estate of Dale C. Eckert Corporation ("Petitioners") hereby petition for a writ of certiorari in respect to the decision of the Ninth Circuit Court of Appeal, Northern District of California, filed May 26, 1995. This petition asks that this Court consider the interpretation of *Federal Rule of Appellate Procedure ("FRAP") 4 (a)(5),* which reads as follows:

> **The district court, upon a showing or excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a).** Notice of any such motion which is filed after expiration of the proscribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such proscribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later. (emphasis added)

The decision, appended hereto as *Exhibit A*, stated in relevant part (at page 5780): "This court has applied the good cause standard on to extension motions filed within the initial thirty-

day appeal period following judgment. When a motion for extension of time to appeal is filed, as here, *after* the expiration of such thirty-day period, the appropriate standard for extension of the filing period is 'excusable neglect.'"

The Court relied upon *Oregon v. Champion Int'l Corp.* 680 F.2d 1300 (9th Cir. 1982).

The Court did not address apparently contradictory statements contained in other Ninth Circuit cases. *Olson v. National Broadcasting Co. Inc. 855 F.2d 1446, 1453* (9th Cir. 1988) stated that " ... the district court **'upon a showing of good cause *or* excusable neglect'** may within thirty days after the expiration of the time for filing extend the time for filing a notice of appeal ... " (emphasis added) See also *Pratt v. McCarthy* 850 F.2d 590 (9th Cir. 1988).

Further, the Court did not acknowledge considerable authority in other districts which have expressly rejected the holding of *Oregon*, or independently arrived at a wholly different interpretation of the statute. These include *Scarpa v. Murphy* 782 F.2d 300 (1st Cir. 1986), *Pontarelli v. Stone* 930 F.2d 104 (1st Cir. 1991), *Weekley v. Jones* 927 F.2d 382, 386 (8th Cir. 1991) and *Cyrak v. Lemon* 919 F.2d 320 (5th Cir. 1990) and others set forth herein.

B. The principle of "plain reading"

The process of statutory interpretation begins with an analysis of the statute's language. *Mallard v. United States District Court for the Southern District of Iowa* 109 S.Ct. 1814, 104 L.Ed.2d 318 (1989). As Justice Holms has said: "we do not inquire what the legislature meant; we ask only what the statute means." [1] "[W]e must interpret the statute as written." *Wadsworth v. Whatland* 562 F.2d 70 (1st Cir. 1977). "Courts properly assume, absent sufficient indication to the contrary, that Congress intends the words in its enactments to carry 'their ordinary, contemporary, common meaning.' [citation omitted]" *Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. Partnership* 113 S.Ct. 1489 (1993).

> If the words are plain, they give meaning to the act, and it is neither the duty or the privilege of the courts to enter speculative fields in search of a different meaning. Reports to congress accompanying the introduction of proposed laws may aid the courts in reaching the true meaning of the legislature in cases of doubtful interpretation ... (citations omitted) ...

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1 Holmes, *Collected Legal Papers*, P. 207 (New York, 1920), cited with approval in *Statutes and Statutory Construction*, Singer, 4th Ed., Vol. 2A, p. 30

> [W]hen words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by consideration drawn from ... reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent. *Caminetti v. United States* 37 S. Ct. 192, 196 (1913)[2]

C. The *Oregon* court's error in interpretation

The facts of *Oregon* were simple. Through apparent inadvertence or clerical error the notice of appeal was mailed to the state rather than district court. Applying the then existent standard that "excusable neglect" could be found only when the error was attributable to someone other than a party or its counsel, the majority of the court held that the neglect was inexcusable. Thus the *ratio* of *Oregon* is that a party could not be excused from

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2 Cited in, among many others, *Hill v. U.S.* 720 F.Supp. 95 (W.D. Mich. 1989)

clerical error for which they were responsible. *Pioneer* has subsequently directed the courts to apply a more lenient standard.

A dissenting opinion took exception with the strict interpretation of "excusable neglect," however neither the majority nor dissenting opinion addressed the more fundamental principle of plain reading forming the foundation for statutory interpretation.

Without preamble or explanation of the ambiguity that it felt necessary to interpret, the *Oregon* court majority opinion incorporated into the plain reading of the statute a portion of the *FRAP 4(a)(5)* Committee Note:

> The proposed [adopted] amended rule expands to some extent the standard for the grant of an extension of time. The present rule [former subdivision (a)(5)] requires a "showing of excusable neglect." While this was an appropriate standard in cases in which the motion is made after the time for filing the notice of appeal has run, and remains so, it has never fit exactly the situation in which the appellant seeks an extension before the expiration of the initial time. In such a case "good cause," which is the standard that is applied in the granting of other extensions of time under Rule 26(b) seems more appropriate.

It is respectfully submitted that, in so doing, the majority in *Oregon* made unnecessary and therefore incorrect referral to extrinsic material. The record does not reflect a request for rehearing.

The statute clearly provides that the district court is authorized to consider either one of two alternatives in deciding whether to grant an extension of time: "upon a showing of excusable neglect ***or*** good cause..." (emphasis added) "Or" is defined by the venerable *Black's Law Dictionary* (5th. Ed., 1979) as "a disjunctive particle used to express an alternative or to give a choice of one among two or more things."

The Committee Note is substantially different than the plain language of the statute, providing that one standard (good cause) be applied before the expiration of the time to file notice, and another (excusable neglect) thereafter. While the dichotomy

proposed by the Committee Note is not unprecedented,[3] on a plain language reading the statute does not contain two separate standards. While the courts often, and properly, refer to the Committee Notes to construe ambiguities in statutes, in this instance the result has been to elevate the committee note above the plain wording of the statute.

This point has not been directly considered by the Supreme Court, however was tangentially addressed in *Pan-Islamic Trade Corporation v. Exxon Corporation* 102 S.Ct. 427. The majority

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3 See for comparison *Federal Rule of Civil Procedure 6 (b)* which states in part:

(b) Enlargement. When by theses rules or by a notice given thereunder or by order of court an act is required or allowed to be done within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefore is made before the expiration of the period originally proscribed or as extended by previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect ...

denied a petition for a writ of certiorari, however Justice Rehnquist wrote a dissenting opinion.

The question in *Pan-Islamic Trade Corp.* was whether an appellant could rely upon the district court's ill-founded opinion that a "motion to reconsider" tolled the time to find a notice of appeal. The majority of the Court, by denying the petition, sustained the Seventh Circuit's opinion that the reliance fell into the "reliance on a judicial officer" exception to the 30 day notice filing requirement.

In his dissent Justice Rehnquist did not address *Oregon*, however his comments regarding *FRAP 4(a)(5)* are illuminating. It is evident that he considered the statute clear in its meaning.

> The barrier of the 30-day rule is not impenetrable, however, for the Rules provide that the District Court may, "upon a showing of excusable neglect or good cause" extend the time for filing a notice of appeal. Fed.Rule App.Proc. 4(a)(5). ... Respondent could have made such a request up to 60 days after the District Court had initially denied respondent's post-trial motion.

"We are not at liberty to construe language so plain as to

need no construction, or to refer to committee reports where there can be no doubt of the meaning of the words used." *Helvering v. City Bank Farmers Trust Co.* 56 S.Ct. 70 (1935). "In proper cases, such reports are given consideration in determining the meaning of a statute, but only where that meaning is doubtful. They cannot be resorted to for the purpose of construing a statute contrary to the natural import of its terms. ... 'If the language be clear it is conclusive. There can be no construction where there is nothing to construe.'" *United States v. Shreveport Grain & Elevator Co.* 53 S.Ct. 42 (1932).

> It is an elementary and indeed cardinal rule of statutory construction that where a statute uses plain and unambiguous words, courts are not justified in changing the wording to meet particular situations, even where it might be thought that the legislative body might have changed the words, if the particular subsequently arising contingency had been then in contemplation. *Moncrief v. Hobby* 133 F.Supp. 152

D. "Good cause" and "excusable neglect"

That is not to say that the statute is without ambiguity. Some commentators have referred to the continuum between "cause" through "good cause" to "excusable neglect" as being similar to Mohr's Table of Hardness: calcite is harder than talc, but softer than gypsum. Similarly "good cause" is harder than"cause" but softer than "excusable neglect."

Others have taken a contrary view:

> As an original matter we might think it so much hairsplitting to try to distinguish excusable neglect from good cause, or even that, if the hairs must be split, excusable neglect connotes a laxer standard than good cause. "Excusable" is not as meritorious as "good" (compare the distinction in criminal law between justifiable and excusable homicide), or "neglect" as "cause." *Lorenzen v. Emp. Ret. Plan of Sperry & Hutchinson* 896 F.2d 228 (7th Cir. 1990)

The definition of "excusable neglect" is an uncertain and evolving standard. Had the *Oregon* court turned to the Committee Note to resolve the ambiguity of "good cause" or "excusable neglect" it would not have been an error. Prior to *Pioneer*, the

courts considered themselves obliged to "interpret the excusable neglect standard narrowly." *Pearson v. Gatto* 933 F.2d 521 (7th Cir. 1991). In *650 Park Ave. Corp. v. McRae* 836 F.2d 764 (2nd Cir. 1988) it was held that excusable neglect results only "from the acts of someone other than the appellant or his or her attorney or from events otherwise beyond their control."

Excusable neglect is now described by the Supreme Court as "a somewhat 'elastic concept' ... not limited strictly to omissions caused by circumstances beyond the control of the movant ... [W]e conclude that the determination is at bottom an equitable one, taking into account of all relevant circumstances surrounding the party's omission." *Pioneer, 1496-98*

It is this judicial evolution on which the Ninth Circuit founded its decision in this matter. With respect, while petitioners concur with the opinion insofar as it states that *Pioneer* has opened the door to a more liberal interpretation of excusable neglect, it is submitted that good cause is an equally valid basis on which to

found the extension of time pursuant to *FRAP 4(a)(5)*.

The statute clearly offers two alternative foundations on which the district court can extend time. There is no *statutory* justification for elimination of one. By focusing on the definition of "excusable neglect" this Court has followed in the ill-placed footsteps of *Oregon*, and, respectfully, is engaging in constitutionally improper judicial creation of law contrary to the clear intent of Congress.

FRAP 4(a)(5) offers two alternatives, either of which is limited by two boundaries of time. The motion cannot be brought before entry of judgment, or later than 60 days following entry. If brought in the first 30 days, the motion can be *ex parte*, if brought in the second 30 days, if must be a noticed motion. The district court must use its sound discretion to decide whether either good cause or excusable neglect is shown. There is no uncertainty in the statute.

By incorporation of the Committee Note the *Oregon* court,

and those that have followed its course, have created, not resolved, ambiguity. The elasticity of "excusable neglect" has at times been stretched beyond reasonable limits, as the courts, faced with a good cause for extension, but limited by *Oregon*, have struggled to cover the facts and justice of the moment.

Courts have found "good cause," then performed the alchemy necessary to hold it "excusable neglect." For example see *United States v. Roberts* 749 F.2d 404, 408-409 (1984): "Where there is good reason for allowing an extension ... we are not obliged to insist on perfect compliance ... we are inclined to take a practical view in assessing whether he has satisfied the filing requirement ...[and] consider the acceptance of the notice of appeal by the district court to be tantamount to a finding of excusable neglect."

Some courts have held themselves bound to follow *Oregon*, yet nevertheless have sought equity. For example, the courts have held the misdirection of mail to be neglect, in some instances excusable, in others inexcusable. In *Oregon* the court held that the

misaddressing by a secretary to the state court rather than the federal court was inexcusable. In *Ramsuer v. Beyer* 921 F.2d 504 (3rd Cir. 1990) the court found it excusable neglect when a notice was not delivered by the post office for thirteen days after its mailing. [4]

E. Decisions Which Contradict *Oregon*

Where the courts have not held themselves bound by *Oregon*, but rather have applied the discretion granted by *FRAP 4(a)(5)*, the intellectual gymnastics appear less tortured. Compare *Ramsuer* with *Scarpa*, wherein the court considered an analogous situation of a letter taking five days to be delivered three miles. Granting the extension, the court stated:

> We regard the *Oregon* court's statement that the phrase 'good cause' is applicable only when the motion is filed

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[4] See also *Gibbs v. Town of Frisco City* 626 F.2d 1218 (5th Cir. 1980) and *U.S. v. Twomey* 845 F.2d 1132 (1st Cir. 1988)

> before the time for filing the appeal has expired ... as an unwarranted maiming of the rule ... The rule expressly recognizes 'good cause' as a basis for extension before and after the appeal time. There was no mistake by counsel, excusable or otherwise. *Scapa, 301*

Courts of appeal in both the Ninth Circuit and other circuits have rejected or ignored *Oregon's* view of the statute, literally applying the alternative conditions set forth in the statute. The result has become confusion in the law.

For example the Ninth Circuit has stated: "The district court may extend the appropriate time period set out in Rule 4(a)(1) 'if two requirements are met: (1) the motion for the extension is filed no later than 30 days after the expiration of the original appeal period; and (2) the moving party makes a sufficient showing of 'excusable neglect or good cause' for not meaning the original deadline. Fed.R. App. P. 4(a)(5).'" *Pratt,* 592 citing *Alaska Limestone Corp. v. Hodel* 799 F.2d 1409, 1411 (9th Cir. 1986)

In *Wright v. Deyton* 757 F.2d 1253 (11th Cir. 1985) it was stated that both good cause and excusable neglect were available to

the district court in determining whether to grant an extension.

"Given we find at least some evidence in the record suggesting good cause or excusable neglect ... we cannot conclude the district court abused its discretion." *Weekley*, 386

Holding that the requirement for a noticed motion in *FRAP 4(a)(5)* is mandatory, *Pryor v. Marshall* 711 F.2d 63, 65 (6th. Cir. 1983) stated: "A late notice of appeal which fails to allege excusable neglect ***or good cause*** can no longer serve as a substitute ... Although the district court has the power to extend the time for filing a notice of appeal, such an extension is contingent upon the showing of excusable neglect ***or good cause*** made by motion not later than 30 days after the expiration of the original 30 period..." (emphasis added)

In *Cyrak v. Lemon* 919 F.2d 320 (5th Cir. 1990) the thirtieth day following entry was April 14, 1989. On May 15, 1989 one appellant filed a motion for an extension of time to file an

appeal. It was granted for "good cause" and the court of appeal found that it obtained jurisdiction from the subsequent filing.

"Extensions of this jurisdictional requirement [to file a notice of appeal] are allowed only in cases of 'excusable neglect' or 'good cause' and any extension must not exceed 30 days from the original filing date." *Buggs v. Elgin, Joliet & Eastern Ry. Co.* 852 F.2d 318 (7th Cir. 1988)

Perhaps the most straightforward challenge to the reasoning of *Oregon* has been mounted by the First Circuit's decision in *Pontarelli.* Citing *Scarpa*, the court stated:

> [T]he language of *FRAP 4(a)(5)* itself, which could hardly be clearer, in no way intimates that "good cause" is to be utilized exclusively in the evaluation of *FRAP 4(a)(5)* requests submitted within the thirty day period for lodging an appeal as a matter of right ...
>
> We explore the plain language of the amended rule for further delineation of the appropriate scope of any "good cause" analysis in the circumstances of the present case. The search is assisted by the interpretive precept that the language of the amended rule should be ascribed no meaning that would render any part of it superfluous ...

> The plain language of the amended rule "expressly recognizes 'good cause' as a basis for extension both before and after the expiration of the appeal time" [citation omitted]...
>
> No less significantly, the original "excusable neglect" standard, whose customary scope remains unlimited under the scope of the amended rule, would be pared by gratuitous interpretation if the amendatory "good cause" analysis were not confined to circumstances unsuited to the traditional "excusable neglect" analysis.

VII. CONCLUSION

For the foregoing reasons it is respectfully requested that this Court grant a writ of certiorari to review the subject decision and provide determinative and uniform guidance to the courts of appeal and to practitioners on the proper application of the "excusable neglect" and "good cause" standards of *FRAP 4(a)(5)*.

The courts of appeal are clearly divided on this matter, with the First, Fifth, Sixth, Seventh, Eighth and Eleventh Circuits having rendered decisions clearly contradicting the holding of the Ninth Circuit in *Oregon*.

Respectfully submitted August 23, 1995.

THE LAW OFFICE OF WILLIAM McKINNON

_____

William McKinnon
Counsel for Petitioners
Grant Reynolds and
Estate of Dale C. Eckert Corporation

VIII. APPENDIX OF OPINIONS AND ORDERS

Decision of the Ninth Circuit Court of Appeals
May 26, 1995

Order of the United States District Court
October 28, 1995

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SA CV 91-395 GLT Date 10/28/93

Title REYNOLDS, ET AL. V. PHILIP B. WAGNER & WILLIAM SIMON

DOCKET ENTRY:

I hereby certify that this document was served by first class mail, postage prepaid, to all counsel for parties at their respective most recent address of record in this action on this date;
date 10/28/93
R. Walters
Deputy Clerk

PRESENT:

HON. Gary L. Taylor JUDGE

Robert Bolton
Deputy Clerk

None Present
Court Reporter (RAW)

ATTORNEYS PRESENT FOR PLAINTIFFS:

None Present

ATTORNEYS PRESENT FOR DEFENDANTS:

None Present

PROCEEDINGS: ORDER GRANTING PLAINTIFFS' MOTION FOR EXTENSION OF TIME TO FILE NOTICE OF APPEAL

Plaintiffs' Motion for Extension of Time for Filing Notice of Appeal is GRANTED, and Plaintiffs may file their Notice of Appeal no later than November 15, 1993. Plaintiffs should consult Local Rule 17 and the Clerk of the Court regarding fees and procedures for filing their Notice.

The matter is taken off calendar for November 1, 1993.

Initials of Deputy Clerk RW

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GRANT REYNOLDS, and THE ESTATE OF DALE C. ECKERT CORPORATION,
Plaintiffs-Appellants,
v.
PHILIP B. WAGNER; WILLIAM SIMON,
Defendants-Appellees.

No. 93-56629
D.C. No.
CV-91-00395-GLT
OPINION

Appeal from the United States District Court
for the Central District of California
Gary L. Taylor, District Judge, Presiding

Submitted April 3, 1995*
Pasadena, California

Filed May 26, 1995

Before: John T. Noonan, Jr., Diarmuid F. O'Scannlain, and Edward Leavy, Circuit Judges.

Opinion by Judge O'Scannlain

*The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed. R. App. P. 34(a), Ninth Circuit R. 34-4.

SUMMARY

Civil Litigation and Procedure/Appeals – Procedure/ Appeals – Jurisdiction

The court of appeals remanded a case. The court held that remand was warranted so that the district court could make a finding as to whether appellants' explanation for failing to timely file a notice of appeal met the Supreme Court's standard for "excusable neglect."

Dale C. Eckert Corp., a general contractor, entered into a construction contract with Orange Tree Associates, a developer. Pursuant to the contract, Eckert was to construct a condominium complex for which Orange Tree was to pay. Orange Tree funded the project by borrowing money from State Savings and Loan Association, secured by a first lien on the real property. State Savings became insolvent, and the Federal Savings and Loan Insurance Corp. (FSLIC) was appointed as a receiver. The FSLIC chartered New West Federal Savings and Loan Association as a successor entity. New West acquired the note on the Orange Tree project.

Prior to the project's completion, Orange Tree filed a petition in bankruptcy under Chapter 11. Orange Tree's principal creditors were New West and Eckert, which held a mechanics lien. The amount due New West, which had a priority lien on the real property, far exceeded the project's value.

Eckert filed for bankruptcy. Appellee Philip Wagner was appointed as trustee for the Eckert estate. Appellee William Simon was appointed as attorney for Wagner in his capacity as trustee. Wagner agreed to exchange Eckert's disputed, secured claim for an undisputed, unsecured claim of a lesser amount.

Appellant Grant Reynolds, a subcontractor on the project, was one of Eckert's major creditors. Dissatisfied both with the

Orange Tree reorganization plan and with the proposed compromise, Reynolds advised Wagner of his theory that New West was a joint venturer on the project and thus could not also be the senior lienholder. Wagner rejected Reynolds' advice, electing not to challenge New West's claim.

Special counsel for the Eckert estate brought an action in bankruptcy court seeking to overturn the Orange Tree reorganization plan. The court held that the limitations period for seeking a revocation of the reorganization plan had lapsed, and dismissed Eckert's claim as untimely. The Bankruptcy Appellate Panel and the court of appeals affirmed.

Reynolds and the Eckert estate filed an action against Wagner and Simon, alleging that they had been negligent in failing to pursue Eckert's claims against Orange Tree. The district court granted Wagner's and Simon's motions for summary judgment.

Reynolds and Eckert failed to file an appeal within 30 days of the entry of summary judgment in favor of Wagner and Simon. Instead, three days after the time to appeal had expired, Reynolds and Eckert filed a Motion for Extension of Time for Filing Notice of Appeal. In explanation of the delay, counsel for the Eckert estate stated that he had failed to make contact with the Eckert trustee in the 30 days following the entry of judgment, and thus was unsure whether to proceed with the appeal. The district court granted the motion for an extension of time.

[1] In *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 113 S. Ct. 1489 (1993), the Supreme Court held that attorney negligence may, in certain circumstances, constitute "excusable neglect," considerably liberalizing its meaning and prescribing a new analytical test. [2] Although the Court in *Pioneer Investment Services* explored the meaning of "excusable neglect" within the context of a federal rule of bankruptcy procedure, *Pioneer Investment Services* was appli-

cable in this case. [3] "Excusable neglect" in the context of Fed. R. App. P. 4(a)(5) has the same meaning as the Court determined in the Bankruptcy Rules context. Accordingly, the case was remanded to the district court for a finding whether Reynolds' and Eckert's explanation met the *Pioneer Investment Services* standard.

COUNSEL

William McKinnon, Sausalito, California, for the plaintiffs-appellants.

Stuart K. Lesansky, Charlston, Revich & Williams, Los Angeles, California, for defendant-appellee Wagner.

Stephen T. Hodge, Wehner and Perlman, Los Angeles, California, for defendant-appellee Simon.

OPINION

O'SCANNLAIN, Circuit Judge:

What constitutes "excusable neglect" when the appellant fails to file a notice of appeal on time? We must interpret what the Supreme Court did *not* say in a recent case.

I

In 1982, the Dale C. Eckert Corporation ("Eckert"), a general contractor, entered into a construction contract with Orange Tree Associates, a developer. Pursuant to that contract, Eckert was to construct a 100-unit condominium complex in Long Beach, California, for which Orange Tree was to pay it $5.3 million. Orange Tree funded the project by borrowing $10.56 million from State Savings and Loan Association, secured by a first lien on the real property.

State Savings ultimately became insolvent. In September 1988, the Federal Savings and Loan Insurance Corporation ("FSLIC") was appointed as a receiver for the defunct institution. The FSLIC chartered New West Federal Savings and Loan Association ("New West") as a successor entity.[1] New West acquired the note on the Orange Tree project.

In April 1985, prior to the project's completion, Orange Tree filed a petition in bankruptcy under Chapter 11. Orange Tree's principal creditors were New West and Eckert, which held a $765,763 mechanics lien. Because the amount due New West, which had a priority lien on the real property, far exceeded the project's value. Eckert's claim was rendered virtually worthless.[2]

In March 1986, Eckert itself filed for bankruptcy. Philip Wagner was appointed as trustee for the Eckert estate. One year later, William Simon was appointed as attorney for Wagner in his capacity as trustee for the estate.

Recognizing that Eckert's interest was subordinate to the secured lien of the bank, which was likely to account for all of Orange Tree's assets, Wagner agreed to exchange Eckert's disputed, secured claim of $765,763 for an undisputed, unsecured claim of $75,000. Orange Tree had proposed a reorganization plan under which unsecured creditors would be paid approximately ten cents on the dollar. Under this plan, Eckert would realize about $7,500 in satisfaction of its claim.[3]

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[1]The remainder of this opinion will not distinguish between New West and its predecessor-in-interest, but instead will refer to the institution as New West.

[2]The value of Eckert's claim was further diminished by the fact that Orange Tree disputed it.

[3]The bankruptcy court approved the Orange Tree reorganization plan in June 1988. Wagner voted for the plan.

Appellant Grant Reynolds, a subcontractor on the Long Beach project, was one of Eckert's major creditors. Dissatisfied both with the Orange Tree reorganization plan and with the proposed compromise, Reynolds advised Wagner of his theory that New West was a joint venturer on the Long Beah project and thus could not also be the senior lienholder. If Wagner could successfully demonstrate a joint venture, Reynolds contended, New West's deed of trust would be set aside and Eckert could collect all of its claim. Wagner rejected Reynolds' advice, electing not to challenge New West's claim.

In September 1988, Wagner and Orange Tree filed a joint motion in Eckert's bankruptcy proceeding seeking approval of the compromise of Eckert's claim. Reynolds appeared at this hearing, and raised his objections. Further, Reynolds offered to pay the estate more than the $7,500 it would receive from the compromise and to hire special counsel to pursue Eckert's claim against Orange Tree. The court accepted Reynolds' offer. In addition, the court permitted Wagner to resign as trustee, and appointed a new trustee for the estate.

Special counsel for the Eckert estate then brought an action in bankruptcy court in March 1989, seeking to overturn the Orange Tree reorganization plan. The court held that the limitations period for seeking a revocation of the reorganization plan had lapsed, and dismissed Eckert's claim as untimely. The Bankruptcy Appellate Panel affirmed on this ground, as did this court. *See In re Orange Tree Assocs. Ltd.*, 961 F.2d 1445 (9th Cir. 1992).

Reynolds and the Eckert estate thereafter filed the claims in this action against Wagner and Simon, alleging that they had been negligent in failing to pursue Eckert's claims against Orange Tree. Both Wagner and Simon filed motions for summary judgment which the district court granted, reasoning that they could not have recovered in the Orange Tree bankruptcy proceedings because of the primary lien of New West Bank,

and because the doctrine enunciated in *D'Oench Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) barred any claims that could have been asserted to challenge the lien. Reynolds and Eckert appealed.[4]

II

Before we may consider the merits of this appeal, however, we have a controlling threshold jurisdictional issue. A brief overview of the procedural history of this appeal is necessary to sort it out.

A

The district court entered summary judgment in favor of Wagner and Simon on September 1, 1993. Pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure, Reynolds and Eckert had thirty days in which to file an appeal — that is, until Friday, October 1, 1993 — which they failed to do. Instead, on Monday, October 4, 1993, three days after the time to appeal had expired, Reynolds and Eckert filed a

[4]As an initial matter, we consider Wagner's and Simon's contention that Reynolds is not properly before this court as an appellant. The first sentence of the Notice of Appeal filed in this case states: "NOTICE IS HEREBY GIVEN that Plaintiff Estate of Dale C. Eckert Corporation, above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment entered in this action on September 1, 1993." Because Reynolds is not mentioned, Wagner and Simon argue, he cannot be considered a party to this appeal. To support their argument, Wagner and Simon cite Rule 3(c) of the Federal Rules of Appellate Procedure, which requires that all parties to an appeal be properly named.

Wagner and Simon are correct in arguing that all parties to an appeal must be clearly identified in the notice of appeal. However, Wagner and Simon fail to note that Grant Reynolds is named in the caption of the Notice of Appeal. Rule 3(c), upon which Wagner and Simon rely, expressly states that: "A notice of appeal must specify the party or parties taking the appeal by naming each appellant *in either the caption or the body of the notice of appeal*." (emphasis added). Because Reynolds is named in the caption, he is properly before this court as an appellant.

Motion for Extension of Time for Filing Notice of Appeal pursuant to Rule 4(a)(5) of the Federal Rules of Appellate Procedure. In explanation of the delay, counsel for the Eckert estate stated that he had failed to make contact with the Eckert trustee in the thirty days following the entry of judgment, and thus was unsure whether to proceed with the appeal. Counsel gave no reason for his inability to meet with the trustee; instead, he stated simply that "[a]lthough both [counsel for the trustee] and I have tried to make contact on several occasions, to this date we have been unable to schedule a meeting wherein he and I could meet with the trustee and obtain his instruction regarding appeal." Without explanation, the district court granted the motion for an extension of time.

Rule 4(a)(5) provides that "[t]he district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a)." This court has applied the good cause standard only to extension motions filed within the initial thirty-day appeal period following judgment. When a motion for extension of time to appeal is filed, as here, *after* the expiration of such thirty-day period, the appropriate standard for extension of the filing period is "excusable neglect." *See Oregon v. Champion Int'l Corp.*, 680 F.2d 1300, 1301 (9th Cir. 1982).

Traditionally, this court has viewed excusable neglect through a narrow lens, finding the standard satisfied only in "extraordinary cases where injustice would otherwise result." *Id.* at 1301; *see also Alaska Limestone Corp. v. Hodel*, 799 F.2d 1409, 1411 (9th Cir. 1986) ("Inadvertence or mistake of counsel . . . does not constitute excusable neglect under this standard."). Noting this, Wagner and Simon contend that the explanation given by Eckert's counsel does not rise to the level of excusable neglect, and thus that we must dismiss for lack of jurisdiction.[5]

[5]Wagner and Simon presented this argument to a motions panel of this court, seeking the dismissal of this appeal. The panel denied the motion.

B

[1] We share Wagner's and Simon's jurisdictional concerns. However, we are troubled not because we believe Reynolds and Eckert have failed to show excusable neglect under this court's stringent definition, but rather because the Supreme Court appears to have just changed the rules. *See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 113 S. Ct. 1489 (1993). In *Pioneer Investment Services*, the Supreme Court held that attorney negligence may, in certain circumstances, constitute "excusable neglect," considerably liberalizing its meaning and prescribing a new analytical test.

In defining the phrase, the Court first noted that Congress "intends the words in its enactments to carry their ordinary, contemporary, common meaning." *Id.* at 1495 (quotations omitted). By using the word "neglect," the Court explained, "Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake or carelessness . . . ." *Id.* The determination of whether such neglect is "excusable," the Court concluded, "at bottom is an equitable one, taking account of all relevant circumstances surrounding the party's omission" — circumstances which include the risk of prejudice to the nonmoving party, the extent of the delay, and its potential effect on judicial proceedings, the reason for the delay and whether the moving party acted in good faith.

Wagner and Simon then filed a motion for reconsideration, which the motions panel denied in part. However, the panel granted the motion to the following extent: "The question of whether the district court abused its discretion in extending the time to file a notice of appeal based exclusively on good cause is referred to the panel considering this appeal on its merits." Accordingly, we are free to review Wagner's and Simon's jurisdictional claim. Further, "the fact that the motions panel denied [appellees'] motion to dismiss this appeal does not free this court from the independent duty to decide whether we have jurisdiction." *United States v. Houser*, 804 F.2d 565, 568 (9th Cir. 1986) (quotations omitted).

[2] We recognize that the Court in *Pioneer Investment Services* explored the meaning of "excusable neglect" within the context of Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure, the provision governing late filings in bankruptcy court.[6] *See In re Dix*, 95 B.R. 134, 137-38 (Bankr. 9th Cir. 1988) (distinguishing between excusable neglect as used in Bankruptcy Rules and excusable neglect as used in Rule 4(a)). Nonetheless, we are persuaded that *Pioneer Investment Services* is applicable to the case before us. "Because the Court's analysis of what constitutes 'excusable neglect' in the bankruptcy context rested on the plain meaning of the terms, there is no reason that the meaning would be different in the context of Fed. R. App. P. 4(a)(5)." *City of Chanute, Kansas v. Williams Nat. Gas Co.*, 31 F.3d 1041, 1046 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 1254 (1995); *see also United States v. Hooper*, 9 F.3d 257, 259 (2d Cir. 1993) (applying *Pioneer Inv. Servs.* in context of Fed. R. App. P. 4(b)).

Further, the Court's opinion draws upon the use of the term "excusable neglect" in several other federal rules. *See Pioneer Inv. Servs.*, 113 S. Ct. at 1496 & n.9 (interpreting "excusable neglect" in context of Rule 6(b) of the Federal Rules of Civil Procedure and of Rule 45(b) of the Federal Rules of Criminal Procedure); *id.* at 1497 (interpreting use of term in context of Rules 13(f) and 60(b)(1) of Federal Rules of Civil Procedure). This suggests to us that the Court's definition extends beyond the limited parameters of Rule 9006(b)(1).

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[6]Bankruptcy Rule 9006(b) provides:

> (1) *In General.* Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by any order of court, the court for cause shown may at any time in its discretion . . . (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

[3] We are persuaded that "excusable neglect" in the context of Rule 4(a)(5) has the same meaning as the Supreme Court recently determined in the Bankruptcy Rules context. Accordingly, we remand this case to the district court for a finding whether Reynolds' and Eckert's explanation meets the *Pioneer Investment Services* standard.

REMANDED.

IX. COUNSEL OF RECORD

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X. PROOF OF SERVICE BY MAIL

United States Supreme Court

Grant Reynolds and the Estate of
Dale C. Eckert Corporation, Petitioners
v.
Philip B. Wagner and William Simon, Respondents

Supreme Court No. _____
Court of Appeal No. 93-56629
U.S. Dist. Crt. No. SACV 91-395 GLT (RWRX)

I declare that I am employed in the County of Marin, California. I am over the age of eighteen (18) years and not a party to this action. My business address is 68 Leveroni Court, Novato, CA 94949

On August 23, 1995 I served the attached **PETITION FOR WRIT OF CERTIORARI** by placing a true copy in an envelope and depositing it with the United States Postal Service for collection and delivery this date addressed as follows:

Stuart Lesansky, Esq.
Lesansky & Associates
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Executed on August 23, 1995 at Bel Marin Keys, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

_____

Carolyn J. Thompson